Supreme Court, U.S.
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No. 96-1949

In The
Supreme Court of The United States
October Term 1996

CLAUDE I. SMELSER,

Petitioner,

v.

NORFOLK AND WESTERN RAILWAY COMPANY,

Respondent.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

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BRIEF IN OPPOSITION WITH APPENDIX

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115 pp

QUESTION PRESENTED

Should this Court accept for review a decision of the United States Court of Appeals for the Sixth Circuit, which reversed a District Court judgment in favor of a plaintiff because an essential element of the plaintiff's proof (as to both the defendant's negligence and causation) was inadmissible opinion testimony received from a non-medical witness, where:

a. The first of Petitioner's two grounds for acceptance of the appeal concerns the proper standard of review for the admissibility of evidence, a ground which Petitioner, in contravention of a specific requirement of the Federal Rules of Appellate Procedure, did not raise in that court; and

b. The second grounds concerns the claimed limitation of the rule announced in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S.Ct. 2786 (1993), to "novel scientific evidence," a ground which Petitioner did not raise at any time until after the Court of Appeals had handed down its decision.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CLAUDE I. SMELSER	)	Nº 95-3489
Plaintiff	)	
vs.	)	Cross Appeal
	)	Case Nº 95-3529
Norfolk and Western	)	
Railway Company	)	
Defendant	)	

DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Pursuant to 6th Cir. R. 25, Norfolk Southern Corporation/ Norfolk and Western Railway makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicaly-owned corporation? Yes

   Listed below is the identity of the parent corporation or affiliate and the relationship between it and the names party:

   Norfolk Southern Corporation is the parent corporation of Norfolk and Western Railway.

2. Is there a publicly-owned corporation, not a party to the appeal, that has a financial interest in the outcome? Yes

Listed below is the identity of such corporation and the nature of the financial interest:

Norfolk and Western Railway Company is a wholly owned subsidiary of Norfolk Southern Corporation; other subsidiaries of Norfolk Southern Corporation are listed on the attached Exhibit "A".

/s/ James F. Brockman
August 4, 1995

EXHIBIT "A"

NAME AND STATE OF INCORPORATION OF
SUBSIDIARIES OF
NORFOLK SOUTHERN CORPORATION

Arrowood-Southern Company, North Carolina
Arrowood Southern Executive Park, Inc., North Carolina
Atlantic Investment Company, Delaware
Charlotte-Southern Corporation, North Carolina
Lambert's Point Docks, Incorporated, Virginia
Lambert's Point Barge Company, Inc., Virginia
Nickel Plate Improvement Company, Inc., The, Indiana
Norfolk Southern Industrial Development Corp., Virginia
Norfolk Southern Properties, Inc., Virginia
Norfolk Southern Railway Company, Virginia
North American Van Lines, Inc., Delaware
NS Fiber Optics, Inc., Virginia
NS Transportation Brokerage Corporation, Virginia
Pocahontas Development Corporation, Kentucky
Pocahontas Land Corporation, Virginia
Sandusky Dock Corporation, Virginia
Triple Crown Services, Inc., Oklahoma
Virginia Holding Corporation, Virginia

Norfolk Southern Railway Company subsidiaries:

Airforce Pipeline, Inc., North Carolina
Alabama Great Southern Railroad Company, The, Alabama
Alexandria-Southern Properties, Inc., Virginia
Atlanta and Charlotte Air Line Railway Company, The, Georgia, North Carolina, South Carolina
Atlantic and East Carolina Railway Company, North Carolina
Camp LeJeune Railroad Company, North Carolina
Carlyle Development Corporation, Virginia
Central of Georgia Railroad Company, Georgia
Charlotte--Southern Hotel Corporation, North Carolina
Chattanooga Station Company, Tennessee
Chattanooga Terminal Railway Company, Tennessee
Chesapeake Western Railway, Virginia
Cincinnati, New Orleans and Texas Pacific Railway Company, The, Ohio
Citico Realty Company, Virginia
Elberton Southern Railway Company, Georgia
15th & K Associates

Georgia Midland Railway Company, The, Georgia
Georgia Northern Railway Company, The, Georgia
Georgia Southern and Florida Railway Company, Georgia
High Point, Randleman, Asheboro and Southern Railroad Company, North Carolina
Interstate Railroad Company, Virginia
Lake Erie Dock Company, Delaware
Live Oak, Perry and South Georgia Railway Company, Georgia
Louisiana Southern Railway Company, Louisiana
Memphis and Charleston Railway Company, Mississippi
Mobile and Birmingham Railroad Company, Alabama
New Orleans Terminal Company, Louisiana
Norfolk and Portsmouth Belt Line Railroad Company, Virginia
Norfolk and western Railway Company
North Carolina Midland Railroad Company, The, North Carolina
Rail Investment Company, Delaware
Richmond-Washington Company, Delaware
St. Johns River Terminal Company, Florida

Shenandoah-Virginia Corporation, Virginia
South Western Rail Road Company, The, Georgia
Southern Rail Terminals, Inc., Georgia
Southern Rail Terminals of Alabama, Inc., Alabama
Southern Rail Terminals of North Carolina, Inc., North Carolina
Southern Railway-Carolina Division, South Carolina
Southern Region Coal Transport, Inc., Alabama
Southern Region Industrial Realty, Inc., Georgia
Southern Region Materials Supply, Inc., Georgia
Southern Region Motor Transport, Inc., Georgia
State University Railroad Company, North Carolina
Tennessee, Alabama & Georgia Railway Company, Delaware
Tennessee Railway Company, Tennessee
Toledo Belt Railway Company, The, Ohio
Virginia and Southwestern Railway Company, Virginia
Yadkin Railroad Company, North Carolina

North American Van Lines, Inc. domestic subsidiaries:

A Five Star Forwarding, Inc., Delaware
A Three Rivers Forwarding, Inc., Indiana
Agency Media Services, Inc., Indiana
City Storage & Transfer, Inc., Colorado
COM TRAMS, Inc., Indiana
Fleet Insurance Management, Inc., Indiana
Great Falls North American, Inc., Montana
NACAL, Inc., California
NAVTRANS Container Lines, Inc., Florida
NAVTRANS International Freight Forwarding, Inc., Indiana
NorAm Forwarding, Inc., Indiana
North American Distribution Systems, Inc., Indiana
North American Forwarding, Inc., Indiana
North American Freight Systems, Inc., Texas

North American Logistics, Ltd., Indiana
North American Moving & Storage, Inc., Indiana
North American Transport Insurance Co., Indians
North American Van Lines of Texas, Inc., Texas
Pro-Trans Services, Inc., Wisconsin

Relocation Management Systems, Inc.,
Delaware
Trans-Star, Inc., Wisconsin

North American Van Lines, Inc., foreign subsidiaries:

Cavalier Moving & Storage Co. Ltd., Canada
Cold Lake Moving & Storage Ltd., Alberta
Curry Moving & Storage, Ltd., Ontario
Midi Data Speditions GmbH, Germany
NAVPAN, S.A., Panama
NAVTRANS International Speditions GmbH,
Germany
North American Van Lines Ltd., England
North American Van Lines Canada Ltd., Canada
North American Van Lines (Alberta) Ltd.,
Canada
North American Van Lines (Atlantic) Ltd.,
Canada
Star Storage Ltd., Canada
Tru-Flite Transportation Systems Inc.,
Canada
Westlake Moving & Storage, Ltd., Canada
Westmount Moving & Storage, Inc.
(Demanagement Et Entreposage
Westmount), Canada

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No. 96-1949

In The
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CLAUDE I. SMELSER,
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v.

NORFOLK SOUTHERN
RAILWAY COMPANY,
Respondent.

On Petition For A Writ of Certiorari
To The United States Court of
Appeals For The Sixth Circuit
Case Nos. 95-3489/3529

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, Norfolk Southern Railway Company, respectfully requests that this Court deny a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above-entitled proceeding on January 27, 1997.

CITATIONS OF THE OPINIONS AND JUDGMENTS DELIVERED IN THE COURTS BELOW

Respondent accepts the opinions below as set forth in Petitioner's brief, but would note that the opinion of the United States Court of Appeals for the Sixth Circuit in the within cause is now reported at 105 F.3d 299.

JURISDICTIONAL GROUNDS

Respondent accepts so much of the jurisdictional statement in Petitioner's brief as sets forth the jurisdiction of the District Court and the Court of Appeals. However, pursuant to its long-standing practice, applicable to appeals under 28 U.S.C. §1254(1), this Court should not exercise merits jurisdiction in this matter because none of the key questions which Petitioner now seeks to present for review was ever timely raised by him in the courts below. (See pp. 7-8 below.)

CONSTITUTIONAL PROVISIONS AND STATUTES AND RULES INVOLVED

In addition to those set forth in Petitioner's brief, Respondent notes the following additions:

Federal Rule of Appellate Procedure 28(a) and (b), in pertinent part:

> **(a) Appellant's brief.** The brief of the appellant must contain, under appropriate headings and in the order here indicated:
>
> . . .
>
> (6) An argument. . . . The argument must also include for each issue a concise statement of the applicable standard of review; . . .
>
> **(b) Appellee's brief.** The brief of the appellee must conform to the requirements of paragraphs (a)(1)-(6), except that none of the following need appear unless the appellee is dissatisfied with the statement of the appellant:
>
> . . .
>
> (4) The statement of the standard of review.

STATEMENT OF THE CASE

Petitioner claims to have suffered injuries to his low back and neck as a result of a rear-end collision. He filed one action against the motorist who rear-ended him, which is still pending in the Ohio Court of Claims. However, in his separately filed FELA claim in the Southern District of Ohio, he claimed that his employer's negligence in failing to remove and/or inspect a defective seat belt caused his injuries in that the seat belt allegedly failed properly to restrain him in an August 29, 1989 accident. He did not, in any way, claim that his employer was responsible for the rear-end accident itself.

The uncontradicted testimony at trial showed that Petitioner had been involved in an accident in the same truck a few months before the accident of August 29, 1989. (Apdx. E). The medical records clearly established the presence of pre-existing degenerative spine conditions predating the accident of August 29, 1989. (Apdx. D).

Petitioner's "expert," Dr. Ronald Huston, who is not a medical doctor, rendered two opinions that the Sixth Circuit held erroneous: (1) Respondent was negligent in that the seat belt failed properly to restrain the plaintiff in the motor vehicle accident, and (2) plaintiff's actual injuries were caused by the failure of the belt properly to restrain him, and were not just

the result of the impact of the collision. (Petitioner's Apdx. A).

In support of the first opinion, plaintiff's expert testified that he drove Respondent's truck around downtown Batavia, Ohio on March 13, 1992, more than two and one half years after the accident. (Petitioner's Apdx. E-48-9). He visually inspected the belt, determined there were stretch marks, measured it and photographed it. He drove the truck at about 25 to 35 miles an hour and slammed on the brakes a few times. (Id.) While he did so, he claimed he held one hand under the shoulder portion of the restraint system and then slammed on the brakes, simultaneously pushing the shoulder portion with his hand. (Id.). He "concluded" that the shoulder portion did not lock properly, but he made no such determination about the lap belt. (Petitioner's Apdx. A-12; Apdx. C).

Twenty months later, in November of 1993, he again "tested" the retractor assembly of the seat belt outside the vehicle. He held the assembly in his hand, tilted it in certain directions and pulled on the webbing, measuring the angle at which it locked, if at all. (Petitioner's Apdx. E-53; Apdx. C). During this testing, he assumed, despite his admission that the mounting position varies from vehicle to vehicle, that the proper mounting plate angle for the seat belt in the vehicle was zero degrees (0°); he claimed it did not lock within the thirty-

five degree (35°) requirement set forth in the Federal Motor Vehicle Safety Standard. (Id.) He admitted that his test results would be inaccurate and inconclusive if the mounting plate was not mounted at zero degrees (0°) in the truck. (Id.) In actuality, the mounting plate was not installed at zero degrees (0°) (Apdx. F). Huston never measured the mounting plate while in the truck nor inspected company specifications to ascertain the precise degree of the mounting plate. (Id.) Although he performed this "test" "about a hundred times", he only measured it five (5) or six (6) times. (Id.)

Huston went on to testify about how he had determined that the plaintiff's body moved during the accident, which was in direct contradiction of how the plaintiff testified his body moved in the accident. (Apdx. C). Huston was the only "expert" who opined that the seat belt did not work properly. (Petitioner's Apdx. E-103-05). Similarly, Huston was the only "expert" who opined that the failure of the seat belt to properly restrain Petitioner caused his specific injuries.

The trial court permitted this testimony despite the fact that Huston admitted he could only testify about forces "in general"; he further admitted that he would defer to the treating physician whether pathology noted in the x-ray reports pre-existed the accident of August 28, 1989. (Petitioner's Apdx. E-109-110). Plaintiff's "expert" did not

know anything concerning plaintiff's previous injuries or medical history (Petitioner's Apdx. E-71) and, instead, in "support" of his opinion only reviewed four radio-diagnostic tests taken after the August 29, 1989 accident ignoring the numerous other medical records and reports to which he could have had access. (Petitioner's Apdx. E-105-06). On the basis of those four pieces of paper (he did not even look at the actual films themselves), and with no other medical information about the plaintiff, he opined that the failure of the seat belt caused his specific injuries. (Petitioner's Apdx. E-106-107).

Plaintiff's treating orthopedic surgeon did not testify the seat belt failure caused Petitioner's injuries. (Apdx. D). He concluded only that the plaintiff's injuries were caused by the rear-end motor vehicle accident. (Apdx. D). He then went on to testify that he has treated other people who have complained of comparable neck and low back pain following rear-end accidents and did not claim that a seat belt had failed properly to restrain them. (Apdx. D).

Therefore, as to both railroad liability and causation, the challenged Huston opinions were essential. Without either of them, he could not have sustained his burden of proof.

REASONS FOR DENYING WRIT

1. IN LIGHT OF THIS COURT'S GRANT OF A PETITION FOR WRIT OF CERTIORARI IN JOINER V. GENERAL ELECTRIC COMPANY (1996), 78 F.3D 524 (11 CIR.), CERT. GRANTED, 117 S.CT. 1243, AND PETITIONER'S FAILURE PROPERLY TO PRESERVE BOTH HIS STANDARD OF REVIEW AND SCOPE OF DAUBERT ARGUMENTS, PETITIONER'S REQUEST FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

At no time until the filing of his petition for a writ of certiorari in this Court did Petitioner ever assert that the proper standard of review was one for an abuse of discretion, rather than review *de novo*. On page 15 of Appellant's brief below (Apdx. G), we specifically advocated the *de novo* standard. Petitioner's brief in that court, including his statement of issues presented for review (Apdx. H), discloses no challenge to our assertion of the proper standard. Respondent filed a motion in limine regarding Huston's anticipated testimony (Apdx. A), and Petitioner responded. (Apdx. B). Although *Daubert* had not been cited by Appellant, Petitioner did not support his expert's methodology, rather merely indicated his expert had sufficient credentials to render the opinions he was going to render at trial. Under Rule 28(b) of the Federal Rules of Appellate

Procedure, Petitioner was required to set forth his understanding of the "standard of review," if he was "dissatisfied" with the appellant's statement of it. He failed to do so.

With respect to Petitioner's new assertion that a trial court's "gatekeeper" role under *Daubert, supra.*, is limited to "novel scientific evidence," he is unable to point to a single page in the record in the trial court where he urged the same distinction he now deems so critical. Similarly, petitioner's brief in the Court of Appeals is utterly silent in that regard, and it was not until his petition for a rehearing in that court that he first advanced this argument.

A sound and universally accepted principle of appellate review, repeatedly recognized by this Court, is that an appellate court will not ordinarily entertain an issue which was not raised below. In Duignan v. United States, 274 U.S. 195 (1927), Mr. Justice Stone, at page 200, expressed the doctrine in these words:

> "It is only in exceptional cases coming from the federal courts that questions not pressed or passed upon below are reviewed."

Other expressions by this Court to the same effect appear in Hormel v. Helvering, 312 U.S. 552 (1941), at 556-

57; Wiener v. United States, 357 U.S. 349 (1958), at 351; U.S. v. Ortiz, 422 U.S. 891 (1975), at 898; U.S. v. Williams, 504 U.S. 36 (1992), at 40; United States v. Alvarez-Sanchez, 511 U.S. ___, 114 S.Ct. 1599 (1994), Footnote 5 at 1605; Dept. of Revenue v. Kurth Ranch, 511 U.S. ___, 114 S.Ct. 1937 (1994), Footnote 9 at 1942; Dolan v. City of Tigard, 512 U.S. ___, 114 S.Ct. 2309 (1994), Footnote 4 at 2315; Field v. Mans, 516 U.S. ___, 133 L.Ed. 2d 351 (1995), Footnote 2 at 440; and Capital Square Review and Advisory Board v. Pinette, ___ U.S. ___, 132 L.Ed.2d 650 (1995), where, at page 659, the comment appears:

> "Whatever the fact may be, the case was not presented and decided that way."

Since the courts below were not presented with the new issues Petitioner seeks to raise herein, he should not be permitted to bring those issues for review on the merits by this Court at this time.

2. A *DAUBERT* ANALYSIS IS APPROPRIATE IN ANY CASE WHERE AN EXPERT'S OPINIONS ARE CHALLENGED AS UNSCIENTIFIC, REGARDLESS OF THE EXPERT'S QUALIFICATIONS OR DISCIPLINE.

At trial, plaintiff's "expert" was extensively voir dired and questioned regarding the bases of his opinion, his testing, his methodology and the limits of his background in these areas. (Petitioner's Apdx. E). The questioning revealed the total lack of any scientific basis for his opinions. This lack of scientific knowledge, despite Huston's alleged scientific background and qualifications, certainly warranted a closer look by the court. As noted by this Court in Daubert, supra., an expert's bald statement that he or she is imparting "scientific knowledge" does not automatically render that person's opinion admissible. Similarly, neither an expert's qualification nor the discipline which he purports to represent automatically precludes a *Daubert* analysis. *Daubert* requires a court exercise its "gatekeeping" function and exclude "unsupported speculation" by determining whether the expert is proposing to testify to legitimate "scientific knowledge." 509 U.S. at 590. This gatekeeping function must be applied to all expert opinions, regardless of the expert's qualifications or discipline. To limit *Daubert* otherwise would permit any seemingly qualified "expert" to testify in the guise of expert

opinions when what he opines is nothing more than a bald unsupported personal opinion and speculation.

3. THERE IS NO CONFLICT AMONGST THE CIRCUITS REGARDING THE PROPER STANDARD OF REVIEW UNDER *DAUBERT*, MERELY A DIFFERENCE IN THE TERMINOLOGY USED TO CHARACTERIZE THE STANDARD OF REVIEW.

A careful reading of the various cases cited by Petitioner discloses that the alleged "conflict" among the circuits does not exist. Each of the cases cited by Petitioner clearly acknowledges that the initial determination of the applicability of the *Daubert* analysis is a question of law. It is important to appreciate, and Petitioner fails to adequately point this out, that there was no challenge to Dr. Huston's academic credentials. Instead, the objection went to the opinions themselves and the underlying testing, methodology and reasoning that lead to them. The point on which the gauntlet was flung down was whether Huston's opinions imparted "scientific knowledge" and whether "the reasoning or methodology underlying the testimony is scientifically valid." The admission of scientific evidence that might not yet be generally accepted in the field, however, is contingent on a trial court's finding that such evidence is indeed scientifically legitimate, and not "junk science" or mere speculation. This gatekeeping role was created simply to shield the jury from having to consider as proof, pure speculation presented in the guise of legitimate, scientifically-based expert opinion. Joiner v. General Elect. Co., 78 F.3d 524, 530 (11 Cir. 1996), cert.

granted, 117 S.Ct. 1243. Even the Joiner court, upon which Petitioner relies so heavily, acknowledges "[t]o the extent that the district court's ruling turns on an interpretation of a federal rule of evidence, our review is plenary." 78 F.3d at 529. We submit that a "plenary" standard of review is synonymous with a "*de novo*" standard of review. Since *Daubert* interpreted Federal Rule of Evidence 702, the interpretation of the applicability of *Daubert* to the facts at hand (whether the expert's opinion is based on 'scientific knowledge'") is, necessarily, a *de novo* review.

4. WHEN AN ENGINEER REVIEWS FOUR X-RAY REPORTS CONCERNING A PARTICULAR PLAINTIFF'S INJURIES, YET DOES NOT KNOW ANYTHING OF THE PLAINTIFF'S SYMPTOMS, DOES NOT REVIEW HIS EXTENSIVE MEDICAL RECORDS, AND ASSUMES INCORRECTLY THAT THERE WERE NO PRIOR INJURIES TO HIS NECK OR BACK, HE IS OFFERING NEW AND NOVEL SCIENTIFIC OPINIONS WHICH, UNDER ANY SET OF CIRCUMSTANCES, REQUIRE A *DAUBERT* ANALYSIS AND WHICH SHOULD BE EXCLUDED BECAUSE SUCH OPINIONS LACK RELIABILITY.

Petitioner now argues, as he did not do in the trial court, nor in his brief or oral argument before the Sixth Circuit, that a *Daubert* analysis should only apply to a trial court's review of "new and novel" scientific opinions. His failure to follow basic rules of appellate procedure is, in and of itself, a "new and novel" approach to raising this issue and should be summarily rejected.

However, if this Court determines the *Daubert* analysis applies only to a review of "new or novel" scientific evidence and opinions, surely it is called for in this case. Huston was not a medical doctor and only reviewed four pages of radio-diagnostic reports. Each of those reports clearly and unequivocally established pre-existing degenerative

spine conditions. Petitioner's "expert" knew nothing else about the plaintiff's injuries. Petitioner's own treating orthopedic surgeon testified that each and every one of those reports reflected these pre-existing degenerative spinal conditions. (Apdx. D). Uncontroverted medical records and evidence established the existence of those spinal conditions as early as 1968 or 1971. (Apdx. D). Plaintiff's "scientific knowledge" was, at a minimum, "new and novel" and, as such, had to be reviewed under a *Daubert* analysis.

The Huston opinions regarding the seat belt failure were also "new and novel." Although he did perform some rudimentary, elementary "tests," his opinions about how the accident happened and what it forced Smelser to do did not "fit" what actually happened. They only "fit" his theory of how the plaintiff might have been injured. Therefore, despite the fact that Petitioner testified otherwise, the "expert" testified about plaintiff's body motions contradictorily to Petitioner. As such, a *de novo* standard of review was proper; since the testimony was nothing more than speculation and not "scientific knowledge" it was properly excluded by the Sixth Circuit.

5. THE RULES OF EVIDENCE APPLY IN AN FELA CASE AS IN ANY OTHER CASE, AND THE REMEDIAL NATURE OF THE STATUTE DOES NOT OBVIATE AN INJURED RAILROAD WORKER'S OBLIGATION TO COMPLY WITH THIS COURT'S CONSTRUCTION OF RULE 702.

Although judges have noted the remedial nature of the FELA, 45 U.S.C. 51, et seq., no court has held, and Petitioner does not cite any case so holding, that an injured railroad worker need not comply with the Federal Rules of Evidence. Indeed, under the FELA, it is clear that the supposedly remedial nature of the statute lessens only the injured railroad worker's burden on causation, not his burden to comply with the Federal Rules of Evidence. Gautreaux v. Spurlock Marine, Inc., 103 F.3d 331 (5th Cir. 1997). As recognized in Green v. River Terminal Railroad Company, 763 F.2d 805 (6th Cir. 1985), ". . . It is still the function of the trial judge within a narrowly prescribed limits . . . to pass upon the sufficiency of the evidence." 763 F.2d at 808. The Green court quotes from Moore v. Chesapeake & Ohio Railway Company, 340 U.S. 573, 576 (1951); "Speculation cannot supply the place of proof."

6. NO MATTER WHAT STANDARD OF REVIEW EMPLOYED, PETITIONER'S "EXPERT'S" OPINIONS INVOLVED UNSUPPORTED AND UNACCEPTABLE SPECULATION.

Nowhere in the opinion of the Court of Appeals is there the slightest suggestion that the outcome in that court would have been any different if it had followed an abuse of discretion standard rather than a *de novo* standard. It is significant, we submit, that the petitioner has not cited a single authority from which one could extrapolate to the conclusion that the testimony of Huston would have been left undisturbed, on appeal, under an abuse of discretion standard whereas it formed the appropriate basis for reversal under a *de novo* standard. In Manstrobuono v. Shearson Lehman Hutton, ____ U.S. _____, 115 S.Ct. 1212 (1995), footnote 1 appearing at p. 1215, is illuminating:

> "Because our decision would be the same under either a *de novo* or a deferential standard, we need not decide in this case the proper standard of a court's review of an arbitrator's decision as to the arbitrability of a dispute or as to the scope of that arbitration. We recently granted certiorari in a case that involved some of these issues. First Options of Chicago, Inc. v. Kaplan, No. 94-560 now pending before this Court."

Applying the salutary approach of this footnote to the present case, we submit that there is no compelling reason to accept petitioner's standard of review claim in the absence of any basis for concluding that the result in the Court of Appeals would have been an affirmance if it had utilized an abuse of discretion standard. The reasoning is especially compelling in the instant cause inasmuch as petitioner failed to properly preserve that issue for review, and this Court has already accepted that issue for review where it was properly preserved in Joiner, supra.

CONCLUSION

Petitioner has failed to properly preserve the issues asserted in his writ. The Sixth Circuit's decision was correct, coming only after an exhaustive review of the materials presented to the trial court. Petitioner's "evidence" at trial failed to pass scrutiny, was not "scientific knowledge" and should have been excluded under a *Daubert* analysis as mere speculation. Because no other "expert" testified that the seat belt failed, or that such failure caused plaintiff's specific injuries, there was no proof on the two indispensable elements of the plaintiff's case. Therefore, the judgment in the Southern District of Ohio was properly reversed and remanded for an entry of judgment in favor of Respondent. This Court should deny Petitioner's petition for a writ of certiorari.

Respectfully submitted,

James F. Brockman
LINDHORST & DREIDAME
312 Walnut Street, Suite 2300
Cincinnati, Ohio 45202-4091
(513) 421-6630

APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

NORFOLK AND WESTERN RAILWAY
COMPANY'S MOTION *IN LIMINE*
REGARDING RONALD HUSTON

Civil No. C-1-92-649
Filed 2/2/94

Pages A-1 thru A-5

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

CLAUDE I. SMELSER	)	No. C-1-92-649
Plaintiff	)	(Judge Carl Rubin)
vs.	)	
	)	
Norfolk and Western	)	Norfolk and Western
Railway Company	)	Railway Company's Motion
Defendant	)	*In Limine* Regarding
	)	Ronald Huston

Amongst the various experts identified by plaintiff is Ronald Huston, a mechanical engineer. Based on the discovery deposition of Mr. Huston and the information contained in plaintiff's pretrial statement, it is clear that Mr. Huston will be called upon to render medical opinions in this case. Specifically, plaintiff intends to call Mr. Huston to render opinions concerning what injuries Mr. Smelser received as the result of the allegedly malfunctioning seatbelt. While Mr. Huston may be able to render certain opinions in this case, his "expertise" is certainly limited and he certainly does not have the requisite medical training or background to render cause and effect opinions regarding Mr. Smelser's medical condition. The reasons for this motion are set forth more fully in the accompanying memorandum.

MEMORANDUM

Article VII of the Federal Rules of Evidence sets forth the specific rules governing opinions and expert testimony in Federal Courts. Specifically, Rule 702 states:

"incredible", and "ignores reality"; damage award reversed.)

(2) In re Agent Orange Product Liability Litigation, 611 F. Supp. 1223, 1244-46 (E.D. N.Y. 1985), aff'd, 818 F.2d 145 (2d Cir. 1987), cert. denied, 108 S.Ct. 2898 (holding expert opinions inadmissible after "rigorous" examination of underlying data, and finding evidentiary hearing was unnecessary because of the unreasonableness of plaintiff's expert's opinions "so blatant that a hearing would be useless".)

(3) Vertibo v. Dow Chemical Corp., 826 F.2d 420 (5th Cir. 1987) (affirming summary judgment for defendant, finding plaintiff's expert's testimony unreliable and inadmissible as it was not more than plaintiff's testimony "dressed up and sanctified as the opinion of an expert. . . Without more than credentials and his subjective opinion, an expert's testimony that 'it is so' is not admissible".)

(4) Edmonds v. Illinois Central Gulf R. Co., 910

F.2d 1284 (5th Cir. 1990) (clinical psychologist expert not qualified to give opinion on causative link between employee stress and worsening of his pre-existing heart condition.)

(5) Laffman By and Through Jacques v. Sherrod, 565 So. 2d 760 (Fla. App. 3 Dist. 1990) (accident reconstructionist and metallurgist could not render an opinion based on examination of orthopedic ex-rays as to cause of moped rider's injuries as study was dependent on radiology and orthopedic medicine which were not a part of witnesses' training or experience.)

It is within this background of increasing judicial scrutiny of experts' use at trial that courts have carefully examined an alleged experts' credentials and limited the subject matters upon which they can render opinions. For example, in Brown v. Syntex Laboratories, Inc., 755 F.2d 668 (8th Cir. 1985), the Court held that the trial court did not abuse its discretion in finding plaintiff's proffered expert's qualifications "marginal" and in rejecting the expert's opinions. That same Court of Appeals has recently rejected proffered expert testimony regarding warnings when the Court found that the expert was not an expert on warnings. Brassette v. Burlington Norther, Inc., 687 F.2d 153 (8th Cir. 1982). The Ninth Circuit Court of Appeals

has rejected testimony of a witness who was qualified as an expert on bank loans, but was not found to be qualified in taxation or accounting so as to opine upon the financial projections or statistics in question. United States v. Mirabelles, 724 F.2d 1374 (9th Cir. 1984). The Sixth Circuit Court of Appeals, finding a pilot to be an expert in that field, refused to allow the pilot to render opinions concerning a plane's fuel system. Ramer v. Rockwell International Corp., 641 F.2d 450 (6th Cir. 1981).

In the case at bar, even if this Court finds that Dr. Huston is qualified to render opinions concerning his examination of the seatbelt at issue and as to whether or not it was functioning properly on the date of this accident, this Court should not permit Huston to render opinions concerning medical causation.

For the foregoing reasons, we respectfully request that this Court rule, *in limine*, that Dr. Huston not be permitted to testify concerning the cause and effect relationship between any alleged failure of the seatbealt to work properly and Mr. Smelser's subsequent medical complaints.

Respectfully submitted,

/s/ James F. Brockman (#0009469)
LINDHORST & DREIDAME
312 Walnut Street, Suite 2300
Cincinnati, OH 45202-4091

(513) 421-6630

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been transmitted by hand delivery to all counsel of record this 2nd day of February, 1994.

/s/ James F. Brockman
Attorney at Law

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

PLAINTIFF'S MEMORANDUM IN RESPONSE TO DEFENDANT, NORFOLK AND WESTERN RAILWAY COMPANY'S MOTION *IN LIMINE* REGARDING RONALD HUSTON

Civil No. C-1-92-649
Filed 2/14/94

Pages B-1 thru B-6

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

CLAUDE I. SMELSER, *Plaintiff,* vs. Norfolk and Western Railway Company, *Defendant.*	) No. C-1-92-649)) (Judge Carl Rubin))) Plaintiff's Memorandum In) Response to Defendant,) Norfolk and Western) Railway Company's Motion) *In Limine* Regarding) Ronald Huston

The Defendant has moved, *in limine,* to exclude the testimony of Dr. Ronald Huston in regard to causation of injury from a failed seatbelt. The Defendant claims that Dr. Huston does not have the qualifications necessary to render such opinions.

Dr. Huston's resume`, attached to the Joint Final Pre-trial Order in this case, demonstrates his qualifications to render opinions on the causation of the medical injury from a failed seatbelt. Dr. Huston earned his doctoral degree from the University of Pennsylvania in 1962. In addition, he is a Licensed Professional Engineer, registered in Ohio. He is full-time member of the faculty of the University of Cincinnati in the Industrial Engineering

program. His professional and society affiliations, listed on page 5 of his resume`, indicate that he is a member of the American Society of Biomechanics, the International Society of Biomechanics, and the Human Factor Society.

Among the many courses he has taught, listed at page 10 of his resume`, are Dynamics, Biomechanics, and Human Body Dynamics.

A part of his editorial activities, listed at page 16 of his resume`, is a reviewer for the Journal of Biomechanical Engineering and Human Factors.

His affidavit, attached, indicates, among other items, that he has been an adjunct professor of Orthopaedic Surgery Research in the College of Medicine at the University of Cincinnati.

The Defendants motion should be denied.

/s/ Michael A. Kennedy (#0002794)
Trial Attorney for Plaintiff
233 East main Street
Batavia, OH 45103
(513) 732-2040

CERTIFICATION

I hereby certify that a true and exact copy of the foregoing was served upon James Brockman, by mailing a copy by ordinary U.S. Mail to LINDHORST & DREIDAME, 312 Walnut Street, Suite 2300, Cincinnati, Ohio 45202-4091 on the 14th day of February, 1994.

/s/ Michael A. Kennedy (#0002794)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

CLAUDE I. SMELSER, *Plaintiff,*	) No. C-1-92-649
	) (Judge Carl Rubin)
vs.	)
	) Affidavit of Ronald L. Huston,
	) Ph.D., P.E. In Support of
Norfolk and Western	) Plaintiff's Memorandum In
Railway Company,	) Response To Defendant, Norfolk
Defendant.	) and Western Railway Co.'s Motion
	) *In Limine* Regarding Ronald
	) Huston
STATE OF OHIO	)
	) SS
COUNTY OF HAMILTON	)

Ronald L. Huston, being duly cautioned and sworn deposes and states as follows:

1. My name is Ronald L. huston. My residence address is 6242 Savannah Avenue, Cincinnati, Ohio 45224. I am 56 years old.

2. I am a Professor of Mechanics in the Department of Mechanical, Industrial and Nuclear Engineering at the University of Cincinnati. I have been teaching and conducting research at the University for the past 32 years. Attached hereto as Exhibit 1 is a current true copy of my curriculum vitae` summarizing my educational background and professional experience.

3. From 1976 to 1988 I was an Adjunct Professor of Orthopaedic Surgery Research in The College of Medicine at the University of Cincinnati. During that time and continuing to the present time I have conducted research on skeletal biomechanics with a focus upon determining injury causing forces.

4. Since the Summer of 1993 I have been directing the establishment of a Spine Research Laboratory in the College of Engineering for the study of spinal stability and the strength of spine elements.

5. I am a Director of the Monarch Foundation for Osteoporosis Research.

6. I have a Ph.D. in Engineering Mechanics awarded by the University of Pennsylvania in 1962. Since then I have been active in teaching, research, and consultation in mechanics.

7. I am a licensed Professional Engineer in the State of Ohio.

8. Biomechanics is a subspecialty of Mechanics. Biomechanics uses the principles of physics, mechanics, and engineering science in the study of biosystems, principally the human body, for the determination of forces, stresses,

and strength of the biosystem. The determination of injury causing forces in high acceleration environments such as occur in vehicle accidents is a principal application of biomechanics.

9. I have been teaching a graduate level year long course in biomechanics at the University of Cincinnati since 1972.

10. I have conducted research in biomechanics for the Office of Naval Research (ONR) from 1972 to 1982. The objective of this research was to determine injury causing forces to pilots and parachutists during accident and high acceleration maneuvers.

11. I have written over 60 articles and papers in biomechanics.

FURTHER AFFIANT SAYETH NOT

/s/ Ronald L. Huston, Ph.D., P.E.

Sworn to before me and signed in my presence on this 8th day of February, 1994.

/s/ _____

Notary Public

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

EXCERPTS OF TRIAL TESTIMONY OF
RONALD HUSTON

Civil No. C-1-92-649
Trial of 4/26/94

Pages C-1 thru C-15

Excerpts of Trial Testimony of **Ronald Huston**

(Trial testimony of 4/26/94)

* * * *

[Page 258]

THE WITNESS: There is a pendulum.

THE COURT: Yes, the pendulum, at some point, if it's working properly, that belt will catch when that belt goes forward so many degrees?

THE WITNESS: That's correct.

THE COURT: Do you have a standard by which to gauge this belt?

THE WITNESS: Yes, well, that's a federal standard. It's the code of Federal Motor Vehicle Safety Standards require that it lock at 35 degrees. When you tilt it, 35 degrees, it is to lock.

THE COURT: I see. So you tested this belt as against the federal standards.

THE WITNESS: That's right.

THE COURT: As to the causation of the injuries, isn't this a -- aren't you giving a medical opinion when you say because the body moved forward the neck was injured and the lower back was injured?

THE WITNESS: No. I'm taking as a given that the neck and back were injured. One of the assumptions that I am making is that Mr. Smelser had no similar neck and back injury before the accident.

THE COURT: Um-hmm.

THE WITNESS: And then what I'm saying is that the forces involved, the kinds of motions involved, and thus

* * * *

[Page 263]

certain medical reports concerning the plaintiff; is that correct?

THE WITNESS: Yes, sir.

THE COURT: Did that include his condition before this accident?

THE WITNESS: No. It was reported to me, I simply accepted it and assumed that he was without these deficits before the accident?

THE COURT: I see. So your opinion is based upon the assumption that he did not have these problems before the accident.

THE WITNESS: Right. And then I accept the medical reports for what they are and can provide the causation.

THE COURT: I see.

THE WITNESS: Through the support.

THE COURT: All right. I have no further questions. If any of you wish to ask a few additional questions, I'll permit it, not extensively, because I think we have covered it pretty well. But I don't want to preclude you from asking any further questions.

VOIR DIRE EXAMINATION

BY MR. BROCKMAN:

Q. Mr. Huston, you told Judge Sherman that you can talk about the forces that are generated in a rear-end impact and how they cause the spine to move; is that fair, sir?

* * * *

[Page 302]

and that he was thrust forward up to the left front corner of the truck.

Q. Okay. You have not reviewed his deposition in this case, have you?

A. No, that's right, I haven't seen that.

Q. And you haven't reviewed any other depositions he may ave given concerning this accident?

A. Yeah, right, I haven't.

Q. So, what you are basing your understanding of his body motion in this accident on is what he told you on March 13, 1992?

A. Yes, I believe that's right. But let me check my notes. There may be one other item here that can be helpful. Give me a moment.

THE COURT: Certainly, Doctor.

A. Yeah, as far as I know, that's all. I was looking at some correspondence that I had to see if indeed that description may have in fact come from either Mr. Zugelter or Mr. Kennedy, but I don't have any record of that, so to the best of my knowledge it came from Mr. Smelser.

Q. And Mr. Smelser told you that he went back and hit his head on the rear windshield, did he?

A. That, I don't recall. I don't remember that.
Q. Did Mr. Smelser tell you that he went forward?
A. Yes. That was -- I have the impression that he did that

* * * *

[Page 310]
up around literally the shoulder area, is that where you were holding on?
A. Yeah, where it's convenient to reach.
Q. And what you were trying to do, while you were driving around hitting the brakes, is first simulate what might happen in an accident as far as a seat belt mechanism is concerned?
A. Yeah, what I was trying to do is basically get the pendulum to swing through.
Q. Okay.
A. I wasn't really, you know, trying to reenact an accident. The reason I went in suburban Batavia, I didn't want to be where there was other cars, because I didn't want to create a hazard.
Q. When you were doing this, sir, did you ever get to the point during this two or three times that you hit the brakes, where you loaded the seat portion?
A. Well, it seemed to me that the lap belt was working.
Q. Did you load it, is that what you're telling me?
A. Well, I don't know if I loaded it substantially or not, because there wasn't a -- what I felt was, I felt my shoulders going forward and the webbing coming out, but

I didn't feel my pelvis going forward.

Now, there are two possibilities there for that. One is that the lap belt was working and held me in place. And

* * * *

[Pages 315-316]

Q. Like the stand?

A. Like the stand, sure.

Q. What you did with this thing, you used the magnet part to mount it on the mounting plate? Where this thing would screw down into the floor?

A. Right.

Q. Okay. And so at that point in time, zero was what you assumed to be the in vehicle position. You tried to hold it so the mounting plate was at zero degrees?

A. That's right. I tried to -- I made an assumption about the zero position, because it's not always easy and some vehicles it varies from one to another, but that was the kind of thing I did, yes, sir.

Q. What varies from some vehicles to another

A. Well, some vehicles will have the retractor mounted such that it you look at the natural dimensions of the retractor, they are not horizontal in the car. That is, you know, they just don't fit in the car, but they are mounted at a slight angle. And this one, assumed that it just mounted pretty much the way it looked. I don't have the retractor here or I could show you.

Q. Does that mean, sir, that some vehicles when the seat

belt assembly is mounted to the floor, that the retractor is not perfectly at zero in relation to the mounting plate?

A. Yes, that's right.

Q. Whether it's mounted?

A. That's correct.

Q. Okay. And let's just say by way of example, in this case, I think you mentioned when you were doing this hand held measurement, you came up with degrees of 40 degrees that it would sometimes lock at?

A. Sometimes at 40, yes.

Q. And if, in fact, the unit is mounted such that zero isn't What the mounting plate is, let's just say it's one degree's difference, your measurement would be 39 degrees?

A. Sure, that's right.

Q. And you could just subtract one by one by one for however many degrees?

A. That's right.

Q. And you have never seen any diagrams concerning this particular retractor mechanism and pendulum mechanism to know what degrees it's set at, have you?

A. No. I didn't. Although, I've worked on other cases with this kind of a mechanism and it seemed, as I recall from looking at those kinds of diagrams, that was not mounted at any substantial angle.

Q. But you don't know what this one is mounted at according to factory specs because you haven't seen them?

A. Yes, that's right, that's what I'm saying.

Q. So, when you held this thing in your hand, you tilted it front, back, left, right about a hundred times?

A. Right.

Q. Did you make a notation for each time you did that and measure the angle?

A. No, I did not.

Q. You were alone when that happened?

A. Well, I was alone most of the time. Whenever I consulted with Mr. Kennedy, I showed him the phenomena as well.

Q. Mr. Kennedy came out to your lab to show you this?

A. No, no, I brought the protractor with me and I showed it to him.

Q. Isn't it true, though, sir, even though you did this about one hundred times, you only tried to measure the angle about five or six times?

A. Yeah. That's probably right. Many times when I did this I couldn't get it to lock no matter what the angle was, and so there was no angle to measure; it just won't lock. If I turned it 90 degrees, it would just right out.

Q. What is the pendulum made out of?

A. Oh, I don't know. It sure looks like made out of the lead or something, soft metal.

Q. Soft metal of some type?

A. Yeah, but I don't know what it is.

Q. You mentioned something to the jury about when, I think it was, when you saw it this second time or later on

when you

* * * *

[Page 320]

Q. Is that the same owner manual that was in the truck?

A. Oh, I don't know the answer to that. It looks like it, but I don't know. I don't -- I don't know the chain of custody on that.

Q. You do have an owner manual for your personal car, don't you, sir?

A. I do.

Q. Have you reviewed that, sir?

A. Have i reviewed it?

Q. Yes.

A. Yeah, I have. I hope you don't have me to recite it to you, I don't remember all things.

Q. I'm not going to. This particular manual was located in he truck the day that you saw it?

A. I think so. I think it was in the glove compartment. But, again, my memory isn't that good I don't remember those details.

Q. Did Mr. Smelser indicate to you that at any time during our discussion with him that the owner's manual that was something that he had reviewed?

A. No, I don't remember any conversation like that one with Mr. Smelser.

Q. Did Mr. Smelser indicate to you that after the accident of June, 1989, that he delivered the truck to an autobody

place for repairs?

A. No, I don't remember that.

Q. Let's talk a little bit about this diagram, again, sir? All right.

Q. Did Mr. Smelser tell you that his left knee came into contact with anything?

A. I don't remember him saying that.

Q. As a matter of fact, in this particular diagram, it doesn't have his left knee coming into contact with anything. Does it, sir?

A. That's right, it doesn't.

Q. And as a matter of fact, in the August, 1989, motor vehicle accident, the one that brings us here today?

A. Um-hmm.

Q. You assumed that the lap belt held Mr. Smelser in position because of what he told you?

A. Right. That's correct.

MR. BROCKMAN: If I may, Your Honor.

THE COURT: Yes.

Q. I know this isn't the truck seat, but as far as --

A. It doesn't look like the truck seat.

Q. But as far as a truck seat is concerned, sir, you'll. agree with me that it's got the seat part the part where your buttocks sits and the back part where your back rest is?

A. Yes, sir.

Q. And in looking at that in comparison to this diagram here, it was your understanding based on what Mr. Smelser

told you that his back stayed against the back of this seat?
A. Well, I don't think he said that. But that was my understanding, is that the lap belt held. But I don't think he said it that way. He described it as being thrust forward.
Q. You came to the conclusion that because the lap belt held, his back stayed against the seat, just as you have got it drawn in every one of these pictures, correct?
A. That's right. To some extent, or some extent that there is movement in the webbing.
Q. Did Mr. Smelser tell you that his left knee went down and it the floorboard?
A. I don't remember him saying that.
Q. Could you step out of the witness chair for me, please, and come down here?
A. What are you going do to me?
Q. Nothing yet, sir, I promise you. Have a seat, please, in that one. Would you be able to demonstrate for the ladies and gentlemen of the jury, just sitting there, and I realize it's not the truck seat, sir, as nearly as you can physically, what you are trying to show them in this diagram here that was prepared with your help?
A. Oh, okay. What I'm trying to demonstrate there is that we're sitting here, and we have the accident, and during the accident, the truck is pushed forward, of course, attached to the truck, so that the seat goes forward, and the first thing that happens is head goes back and that gives a tendency

for the pelvis to go forward and then the back rest pushes the body forward, with the head back, stretched back like that, and then forward and up in this direction so that --

Q. Hold it right there, if you could, please, sir?

A. All right.

Q. Your back is essentially back towards the back of this seat, it's not touching it, but it's up close to it, is it not?

A. I don't know. I can't see it.

Q. Well, can you feel back there?

Q. Oh, yes, there is about four or five inches, that's right.

Q. Try and get your left knee to come out here and touch my hand without moving your buttocks.

A. It won't come out that far unless I stretch it.

Q. It will come out if you shift your buttocks to the edge of the seat, won't it?

A. That's right.

Q. You can take your seat, sir, I'm sorry. You were looking pretty comfortable there.

A. Thank you, it's a better seat than this one.

Q. See what we can do about that for you. Sir, if the lap

* * * *

[Pages 330-331]

for the first one, but I believe the date on that one was June 17, '93?

A. Right, I have got it buried under my medical records.

Q. Page 69, sir. All right, line 18, if you want to read that silently to yourself and go over to the top of page 70.

A. All right.

Q. Okay. Does that refresh your memory, sir, that Mr. Smelser told you that he had hurt his neck in this earlier accident in June of '89?

A. I don't remember that, but that was the impression that I had whenever I had this first deposition, but I don't remember it.

Q. That's what you told me, and I think you have also told me, top of page 70, that Mr. Kennedy referred that to you?

A. Yeah, and I don't remember that either.

Q. Sir, as far as medicine is concerned, you are not a medical doctor, correct?

A. Oh, I think we've said that several times.

Q. You are not a radiologist, somebody who can read radiology diagrams?

MR. KENNEDY: I'm going to object to that. We have been through this once already.

THE COURT: Sustained.

Q. Are you an emergency room person, such as that you would be able to diagnose injuries to somebody upon being presented at the emergency room?

MR. KENNEDY: Same objection.

THE COURT: Sustained.

Q. Sir, let's talk about seat belts in general. You will agree with me, won't you, sir, that a properly working seat

belt will not prevent all injuries?

A. Yeah, that's true.

Q. And a properly working seat belt in this case, shoulder and lap part, would not have prevented Mr. Smelser's head from going backwards, correct?

A. That's right.

Q. Because it just isn't designed to hold your head backwards?

A. Well, it's not designed to hold your head forward.

Q. Forward, I'm sorry.

A. Right.

Q. And would you agree with me in a motor vehicle accident, such as this, the most severe forces occur in the first one hundred milliseconds, or is it ten milliseconds?

A. Well, the event time is usually a hundred milliseconds, and in terms of severe forces, one is usually concerned with what the occupant sees. Actually, like from a rear-end collision, the unusual forces are between the vehicles and the occupant doesn't feel anything. But as that propagates through, then, the occupant begins to feel things, and

* * * *

[Pages 333-334]

Q. How much did it aggravate it?

A. Oh, I don't know. I don't know the degree of that.

Q. Sir, can you say in this particular case that if the shoulder portion of the belt had been working properly, that Mr. Smelser would not have had any neck complaints?

A. No, I haven't expressed that opinion and that's not necessarily my opinion.

Q. Sir, you have been involved in other cases where people have been in a rear-end motor vehicle accident, have you not?

A. Yes, many times.

Q. And where they have a properly working seat belt, correct?

A. Yes, sir.

Q. In a properly working seat belt, shoulder and lap, is not going to prevent low back complaints, is it, sir?

A. Right. Particularly if the back rest fails. Often in automobiles, the back rest will break and then you can get low back problems.

Q. Even if the back rest doesn't fail, a properly working seat belt, lap and shoulder, is not going to really prevent a person from having low back complaints in a rear-end accident?

A. Well, if the back rest doesn't break, then the back rest would provide support. Now, somebody may say that they have been hurt, when in fact they haven't. The belt generally doesn't so much for the rear motion. They keep the occupant from going forward.

Q. Are you trying to tell us here, sir, that if this seat belt had worked properly, Mr. Smelser would not have had any back complaints as a result of this accident?

A. Well, I wouldn't find then a basis for complaint. I

don't know if he would have had them or not, but I wouldn't find a mechanical basis for complaint.

Q. How about the simple fact that just the impact between the two vehicles, that won't generate forces to cause a back complaint?

A. Not generally, because it doesn't create bending. If you take like a pencil, if you really want to break a pencil, try to pull it apart, it won't work; pushing together, it won't break. If you want to break it, just bend it, that will break it. And that's what you can get with the bending. Just the pushing on the spine isn't likely to cause back problems. That's why the astronauts, for example, are lying down whenever they take off.

Q. Sir, you found in cases that the seat belt did work, both parts of it, lap and shoulder, there is still low back complaints, correct?

A. That's right. That's whenever the back rest fails.

Q. And that's the only circumstances?

A. That I have investigated, that's right.

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

EXCERPTS OF TRIAL TESTIMONY OF
MICHAEL LAWLEY, D.O.

Civil No. C-1-92-649
Trial of 4/28/94

Pages D-1 thru D-15

Excerpts of Trial Testimony of **Michael Lawley**, D.O.
(Trial testimony of 4/28/94; deposition taken 1/24/94)
* * * *

[page 20]

Q. And those would be considered herniations in the lumbar area?

A. Correct.

MR. BROCKMAN: Objection.

Q. Doctor, do you have an opinion to a reasonable degree of medical certainty, based upon your education, your experience, your treatment of Mr. Smelser and based upon the history that he gave you when he first saw you, whether or not the condition for which you are treating Mr. Smelser, sacroiliitus and herniated discs in the lumbar area, was directly and proximately caused by the automobile collision that he related to you in his history, which occurred on August 29th, 1989?

MR. BROCKMAN: Objection. Materiality, relevancy, and it is not the issue in this case. Go ahead, sir.

A. Yes, I do.

Q. Okay, and what is your opinion?

A. That the injuries he sustained now or has now are a result from his motor vehicle accident.

Q. Okay. And your current diagnosis of his left knee is what, Doctor?

A. Basically he does have some arthritis in his left knee.

Q. Do you have an opinion to a reasonable degree?

* * * *

[page 31]

Q. All right. Now, I assume that over the course of your training and your actual private practice of orthopedic surgery you have run into a number of patients that have been in motor vehicle accidents, haven't you, sir?

A. Correct.

Q. Is it fair to say a good majority of your practice involves people that have been involved in motor vehicle accidents?

A. No.

Q. Okay. Is it fair to say that it's a decent percentage of it?

A. I'd say so; I'd say, like, 20 percent, 15 percent.

Q. Okay. Within that group of patients you have received histories over the years of people who have been in rear-end accidents before, haven't you, sir?

A. Correct.

Q. And you've been in cases where they have been in rear-end accidents, told you their seat belt was on, and they've come in complaining of neck pain and low back pain and thoracic pain, haven't you, sir?

A. Yes.

Q. And so when you saw this gentleman finally for the first time in your office, the fact that he gave a history of having a seat belt on and complaining of neck pain. . .

* * * *

. . .and thoracic area, correct?

A. Correct.

Q. And those indicate that there's a degenerative spine condition, correct?

A. Correct.

Q. Now, a degenerative spine condition, at least as it shows up on x-ray, indicates that there has been some previous wear and tear to the bony process of the spine, correct?

A. Correct.

Q. All right. Now, those particular degenerative changes are not caused by the motor vehicle accident, are they, sir?

A. Correct.

Q. I mean, they just wouldn't show up on an x-ray the same day of the accident if, in fact, they were caused by that motor vehicle accident, right?

A. Correct.

Q. All right. It 's possible that they could have been caused by any other kind of motor vehicle accident this gentleman might have been involved in, or just through the natural aging process?

A. Correct.

Q. One does not experience a degenerative change in the spine from this particular motor vehicle accident, do...

* * * *

[page 44-47]

Q. Okay. And I think what I asked about was, it showed that there was adequate central and intervertebral foramenal diameters, correct, at L3 and L4?

A. At L3-L4, yes.

Q. Okay, that's a good sign, is it not, sir?

A. Correct.

Q. Again, using Exhibit 11, would you be able to just show us on this what they're talking about, at least what the radiologist is talking about?

A. Basically what they're talking about is L3-L4. The spinal cord goes right down through here and what happens in somebody who has bad arthritis is spinal stenosis, the canal that the spinal cord traverses down, it becomes more narrow, and his canals at that level were fine.

Q. Okay. And if the canals are more narrow at that level, it means they can be pinching in somewhat on the spine as it's going through there?

A. Correct.

Q. All right. And there wasn't a problem, apparently, according to this report, with that particular problem coming about yet?

A. That's correct.

Q. Now, it also makes mention in this same one, sir,

of something called a hypertrophic facet disease. What is that?

A. That's a form of osteoarthritis.

Q. Okay, again, that's a degenerative condition from natural wear and tear or prior trauma?

A. That's correct.

Q. Again, you wouldn't expect that to come out in November of 1989 on a CT seen if it was caused, meaning it wasn't there before and it suddenly appeared later, based on an accident that just occurred a few months earlier, would you, sir?

A. Correct.

Q. Okay. Again, I think at L4 and L5 they make some findings of narrowing of the intervertebral foramena, left greater than right, and there's an anterolateral osteophytic spurring. Again, those are degenerative-type changes, are they not, sir?

A. That's correct.

Q. And not related to the motor vehicle accident?

A. Correct.

Q. At L5 they found something called -- I'm sure I'm going to mispronounce this -- a Schmorl's node?

A. Schmorl's node, yes.

Q. That wasn't too bad. What's a Schmorl's node, sir?

A. It's, what that is, that's where the intervertebral disc, because of wear and tear, it kind of

blends in with the end plate of the L5.

Q. That's, again, some sort of degenerative-type condition that develops?

A. It can be, yes.

Q. Okay. Now, they indicate, at least the person who read this Kenwood Imaging Services CT of the lumbar spine, at time that there was, ". . . questionable bulging annulus with calcification at L4-L5." Does questionable mean that they can't tell from just looking at that whether it's actually bulging or not?

A. I'm not sure. You'd better talk with the radiologist.

Q. Okay, have you ever seen that phrase before, that something on a CT scan was questionable?

A. Yes.

Q. Okay, what's your understanding in the medical field as to what that means?

A. They're not sure what's going on at that level.

Q. All right, they're not sure. And when it says, " . . . with calcification at L4-L5," again, the calcification being present would indicate that it's been there for quite some time, wouldn't it, sir?

A. If that's the cause, yes.

Q. Right. And, again, if there's calcification on a bulging annulus, it's something that's not caused by an accident that took place approximately two-and-a-half to

three months before, because it takes some time for the calcification to develop, correct?

A. Correct.

Q. These types of findings that are in this particular lumbar CT scan, are those the types of findings that you can see in people that have been involved in motor vehicle accidents and trauma?

A. Usually the osteoarthritis that you're seeing in this CAT scan usually will not be caused by that kind of injury that soon. It takes some time before that occurs. All the bulging discs and things like that, the herniation, possibly, yes.

Q. Okay. Whether they're wearing a seat belt or not, correct?

A. Correct.

Q. Now, I'm looking now, sir, at a note of December 5th, 1989.

A. December . . .?

Q. 5th, 1989, and I believe it's a letter to Dr. Ward.

A. Okay.

Q. Okay. I think in that note you indicate that the cervical sprain had pretty much resolved.

* * * *

[page 53-56]

Q. Is that the same type of finding that you made in this gentleman?

A. That's correct.

Q. Dr. Kramer found no reflex changes in examining this gentleman in the upper or lower extremities. Is that the same type of finding that you found?

A. That's correct.

MR. KENNEDY: Continuing objection to reports or recitation of reports from Dr. Kramer.

Q. Now, Dr. Kramer also indicated that he felt a good deal of the patient's symptoms were musculoskeletal strain. Is that basically what you meant when you said it was a whiplash-type injury, at least for the neck area?

A. That's correct.

Q. All right. Would you agree that it's the same type of thing in his lumbar area, at least at that point, that it's a musculoskeletal-type strain?

A. That's correct.

Q. All right. He reported that the CT scan showed degenerative disc disease in the lumbar spine, correct?

A. Correct.

Q. Now, I think you referred to a March 6th, 1990 MRI of the lumbar spine when you were being questioned by Mr. Kennedy. Do you have that one handy, sir?

A. Yes, I do.

Q. All right. That particular one indicates that there's a herniated disc or a bone spur projecting to the right of the midline at L4-5, correct?

A. Correct.

Q. Did you, do you recall, did you look at that one, or you just can't remember, it's been so long?

A. It's been too long.

Q. Okay. It appears, based on what you're telling me about the CAT scan interpretations before, these radiologists in looking at that test, from just looking at that film, can't tell if this is a herniated disc or a bone spur, just because the test isn't infallible, they just can't tell?

A. Exactly.

Q. All right. And a bone spur would be an arthritic-type of change that occurred, the kind of thing we've talked about a little bit earlier, correct?

A. Correct.

Q. And, again, a bone spur March 6th, 1990 wouldn't be something that was -- pardon me, a bone spur that showed up on March 6th, 1990 wouldn't be something that was caused by the motor vehicle accident in August of '89, am I right?

A. Correct.

Q. That's one of those arthritic changes that's not related to this motor vehicle accident, am I right?

A. Correct.

Q. I think it also indicates that, "The signal intensity from the intervertebral discs show severe desiccation and degeneration at L4-L5," correct?

A. Correct.

Q. I think it went on to say, "With an almost total loss of disc tissue," correct?

A. Correct.

Q. Is desiccation the drying out of the disc material?

A. That's correct.

Q. All right, and that's, again, something that comes about because of the degenerative process that they also note, that's indicated there, correct?

A. Correct.

Q. So this gentleman's almost total loss of the disc tissue at L4 and L5, which is the lumbar area, is again part of the aging process that this gentleman's spine has gone through, correct?

A. It can be, yes.

Q. Then there's this moderate spinal stenosis in the area of the L4-L5, referred to again, correct?

A. Correct.

Q. That's the narrowing of the spinal canal, correct?

A. Correct.

Q. That's again something that can be caused through the normal aging process, can't it, sir?

A. Correct.

Q. Is that sometimes congenital, it's something you're born with?

A. It can be, yes.

Q. Okay. You certainly wouldn't expect it in an eight-month interval from an accident to the time this was

taken, that this stenosis is going to show up, if it wasn't there the day of the accident and just suddenly appeared that day, would you?

A. Not with a normal bone scan.

Q. Right. And then on March 30th, 1990 he saw Dr. Kramer again and I think Dr. Kramer reported to you at that time, didn't he, sir?

A. That's correct.

Q. All right, he felt he was not a surgical candidate, correct?

MR. KENNEDY: Again, objection to testimony from, or recitation of statements from Dr. Kramer, based upon hearsay.

A. Correct.

* * * *

[page 68-71]

Q. Sir, were you aware of any x-rays that this gentleman had of his low back in 1971?

A. Not to my knowledge. Mr. Kennedy brought it to my knowledge this morning, but it's the first I've ever heard of it.

Q. Of some prior back problems that this gentleman had?

A. That's correct.

Q. And, in fact, in the history that you obtained from this gentleman you didn't elicit any type of history of prior back problems, did you?

A. That's correct.

Q. Were you shown the x-ray reports, as poor copies as they might have been, from Our Lady of Mercy Hospital?

A. No, I was not.

Q. I'll show you one, sir, and I will tell you it's an old copy, it looks like it's probably off a microform or something. It appears that there are two of them, one from the lumbosacral spine and it looks like there's another one that they did what they used to call a laminagram or a laminagram. I'm not sure how you pronounce it. Why don't you take a moment and look at those and see if you can read them. I tried to highlight a portion of one of them, the bottom, that's really poor.

A. This is from what appears to be April 12th, 1971?

A. Correct. It's our Lady of Mercy Hospital up at the top, I've got that post-a-note stuck over the top of that.

A. This is the lumbar spine?

A. Correct.

A. Wow.

Q. Not a very good copy, is it?

A. No. I can see, "Osteoarthritis change in the intervertebral articulation, with narrowing of the joint spaces."

Q. And that's at L4 and L5, isn't it, sir, where it refers to it later?

A. Something, "Articular facets, L4-L5 within the L4-L5 intervertebral foremen." I can't read this.

Q. Okay. It's not the best copy and I apologize They gave us one of the stamps on it that said, "Best copy available," and we got all this stuff from the hospital. But assuming that they found at that time that there was, "Slight narrowing of the L4-L5 intervertebral disc spaces associated with minimal dorsal slipping of L4 and L5," that's a type of degenerative condition, even back then, that they're noting, isn't it, sir?

A. It can be, yes.

Q. Okay, and based on what you found when you had him go through some of the more sophisticated radiological examinations that we have available now, this kind of finding back then doesn't surprise you, in light of seeing that?

A. Correct.

Q. All right. It also goes on to indicate that, "Spur formation at L4-L5 with considerable impingement of the intervertebral foramena, as is seen in the lateral projection." Would you be able to show us on this Plaintiff's Exhibit Number 11 what area they're talking about at L4-L5, with considerable impingement of the intervertebral foramena?

A. It would be the --

Q. That's cervical. There you go.

A. The nerve root comes out from the spinal cord. Okay, this comes out of the intervertebral foremen, right to

this area, here.

Q. Okay. And when they say considerable impingement, does that mean there's some sort of encroachment on that area?

A. That's correct.

Q. That can impinge on the nerve roots at that point?

A. That's correct.

Q. Because that's where they come through at that point?

A. That's correct.

Q. All right. And back then, if this gentleman had been complaining of any type of radicular complaints in his legs at that time, this kind of finding could have explained it back then, couldn't it?

A. That's correct.

Q. The laminagram, which is a really poor copy, sir, I apologize, seems to indicate again that there's these "Osteoarthritic changes in the intervertebral articulation with narrowing in the joint spaces and reactive sclerosis of the articular facets." You found the same thing about the sclerosis of the facets, didn't you, sir, on either the MRI or the CAT scans that were performed on this gentleman?

A. I believe so.

Q. And you found them in, the same area, didn't you?

A. Correct.

Q. You continue to follow this gentleman on how frequent a basis, sir?

A. I see him every, oh, four to eight weeks, usually.

Q. Okay, when you do see him now every four to eight weeks, do you schedule the appointment as he leaves or is it, and always say four or eight, or do you say, "You call....

* * * *

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

EXCERPTS OF TRIAL TESTIMONY OF
CLAUDE SMELSER

Civil No. C-1-92-649
Trial of 4/25/94 and 4/26/94

Pages E-1 thru E-12

Excerpts of Trial Testimony of Claude Smelser

(taken 4/25/94 and 4/26/94)

* * * *

[pages 163-165]

A. It just tells about the pulling and seeing that it's snug and fast.

Q. And that's the way you would check the seat belt is because that's the way the owner's manual says?

A. That's the way I check it and would use it, yes, sir. And seeing that it was hooked.

Q. Let's talk about this accident in June of 1989. Jude was with you then, sire?

A. Yes, sir.

Q. You were driving the vehicle?

A. Yes, sir.

Q. And some other vehicle struck the side of the N & W truck, correct?

A. Yes, sir.

Q. Now, that particular accident that occurred on June 31, 1989, you were at a standstill, you were stopped in traffic weren't you?

A. Yes, Sir.

Q. The other vehicle, that struck the side, kind of did a 180 and spun around and hit you, correct?

A. Yes, sir.

Q. Was that vehicle pulling out from a driveway behind your vehicle, the one that eventually struck you?

A. No, sir.

Q. Where did it come from?

A. It came from traffic down the -- the eastbound traffic, in moving traffic, fast traffic.

Q. Okay, it was somebody that was in the lane closer to the center line?

A. Yes, sir.

Q. And it was struck by the car pulling out from the rainbow?

A. The lane I was setting in.

Q. Okay. So the car that actually struck your tuck was hit first by another car, spun around and come into the side of your truck?

A. Yes, sir.

Q. Now, in that particular accident, did you have your foot on the brake?

A. Yes, sir.

Q. Where were your hands, do you remember?

A. Probably on the steering wheel, as far as I know.

Q. Okay. And did you hear the impact of the two cars behind you before you felt the impact of yours?

A. No. It's -- it's just the accident, it happened so quick, I mean.

Q. Okay.

A. It was all there, that was it.

Q. Within your tuck, the vehicle strikes the driver's side where you're sitting, correct?

A. Yes, sir.

Q. And what happened to you physically?

A. I was knocked to the, sort of the left side of the door, to the passenger side.

Q. That's the right side the passenger side?

A. Yes, sir.

Q. So when you say you were knocked to the right side or the left side?

A. I was sitting on the driver's side when it was hit. The truck -- when the front and went to the right, and I went to the passenger side.

Q. So you went to the right side also?

A. Yes, sir.

Q. Okay. The seat belt in this truck, it's hooked up above your left, above your shoulder, isn't it, sir?

A. Sir?

Q. It's mounted, the seat belt above you on the left-hand side on the pillar on the inside of the truck there?

A. Yes, sir.

Q. It's above your shoulder?

A. Yes, sir.

Q. And then the strap comes diagonally across your left shoulder down across your check towards your right hip and it's fastened down there, correct?

A. Yes, sir.

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[pages 172-174]

A. Okay.

Q. Do you remember that deposition, sir?

A. Yes, sir.

Q. And with you that day on your behalf was a gentleman named Carl Zugelter, correct?

A. Yes, sir.

Q. And at least at the time of that deposition Mr. Zugelter was an attorney working with Mr. Kennedy representing you, correct?

A. Yes, sir.

Q. And that particular case, on the front page of it is the deposition that was taken and the lawsuit you filed against Mrs. Schuler, the lady that rear--ended you, correct?

A. Yes, sir.

9 Q. Okay. And at that time, sir, on page 49, you were asked did your shoulders hit anything and your response at that time was, "Not to my knowledge, no." Wasn't it, sir?

A. It could have been.

Q. Well, is that what the deposition says?

A. Yes, sir.

Q. Okay. And before that deposition began, you had the opportunity to meet with Mr. Zugelter and know what the deposition was about, correct?

A. Yes, sir.

Q. And before that deposition began, you took the same oath that you took before you went on the witness stand here yesterday to tell the truth?

A. Yes, sir.

Q. The whole truth, nothing but the truth, so help you God?

A. Yes, sir.

Q. And at that time, you said that that was your answer at the time, wasn't it?

A. It was.

Q. Okay. What is the floorboard in a vehicle, do you know?

A. Well, it's the bottom where the feet and all sits.

Q. It's when you're sitting in the vehicle, it's where your feet are, right?

A. Some of it.

Q. Okay. Your left knee hit the floorboard in this case, didn't it, in this accident, rather?

A. I'm saying it hit something in the truck. The floorboard comes up in the truck like this (indicating); it's not flat.

Q. Let's look at this diagram that you were referring to yesterday. It looks like it's Plaintiff's Exhibit 12, according to what is written on the back of it, sir. Let's just take the first picture on the upper left. Your right foot in that picture is on part of the floorboard, is it not?

A. Yes, sir.

Q. And what you're telling us is where the body of the truck is hiding, the compartment here, the floorboard starts to slant up, does it not?

A. Yes, sir.

Q. Okay. And your left knee hit that floorboard in this accident, didn't it?

A. I'm saying my knee hit something. I don't know whether it was the floor. It could have been the floorboard.

Q. Have you ever testified otherwise?

A. Yes, sir.

MR. BROCKMAN: May I, Your Honor, another deposition? Page 33, Mike.

MR. KENNEDY: Right.

MR. BROCKMAN: All right.

Q. Sir, I'm going to hand you a copy of the deposition we took in this case in your lawsuit against Norfolk & Western Railway. I'm going to ask you to refer to page 33 and take a moment to read that. Just let me know when you have had the chance, sir.

A. All right, sir.

Q. Line 20 towards the bottom, question, did your knees hit the dash? Your answer at that time, no. This knee that was hit was in the floorboard. This knee. Question, your left knee. Answer, right. That was your answer at the time, wasn't it, sir?

A. Yes, sir.

Q. And that's what you told me and that's where

your knee...

* * * *

[pages 176-178]

person that sits with your low back in and back all the way against the back part of the seat, are you not, sir?

A. Yes, sir.

Q. That's because you have got this belt around your waist snug?

A. Yes, sir.

Q. Now, when this lady rear-ended you, your buttocks and your back moved forward somewhat in that seat, didn't it?

A. Yes, sir.

Q. Would you be able to show the ladies and gentlemen of the jury how the buttocks moved out, partially out of the seat, and your left knee hit the floorboards here sir?

A. Yes, sir.

Q. Go ahead and do that for us?

A. (Demonstrating.)

Q. Okay. Now, just so we have got it on the record, you're partially out of that seat with your butt still on the seat part, but your back is away from the seat rest?

A. I'm just right here.

Q. Yes. Just so we have got it on the record. See, it's getting typed up and all. I can see what you're doing; I need to explain a little bit for the record. Your back and

your buttocks right around your belt line and below moved away from the back part of the seat, did they not?

A. That's correct, yes.

Q. And then your knee went down to the floorboard, correct?

A. It all went when I went.

Q. Okay. Thank you, sir, you can resume your chair in the witness area, there. Sir, after you gathered yourself up from the actual impact, you unhooked the seat belt, did you not?

A. After I got myself together, yes, sir.

Q. Okay, and you got out of your vehicle under your own power?

A. Yes, sir.

Q. And you went back to check on this lady behind you?

A. Yes, sir.

Q. What kind of car was she driving?

A. To the best of my knowledge, she was driving a '85 Cavalier Chevrolet.

Q. Chevrolet?

A. I can't say -- '85 Chevrolet, station wagon like.

Q. Chevrolet Cavalier?

A. I'd say it was a Chevrolet, I remember that.

Q. You were able to get out of your vehicle, check on her, check where your vehicle was, and then get some help over the radio, correct?

A. Yes, sir.

Q. Your truck has a company radio in it so you can get a hold of the dispatcher down in Portsmouth?

* * * *

[page 179]

Q. Sir, when did you decide the seat belt in this vehicle did not work properly?

A. After I finally got myself together and at the time of the accident I realized I should never have been in the shape like that.

Q. So you knew it at least by the time you got to Anderson Mercy Hospital?

A. Well, it sort of dawned on me why was I in a shape like that when it happened. And I was trying to fool around and get the seat belt unhooked and so forth.

Q. You knew it by the time you got to the hospital?

A. Well, I didn't know at the time. I didn't know at the time.

Q. Well, when did you decide that this seat belt didn't work properly? That's what I'm trying to find out, sir?

A. It was later on.

Q. How much later on?

A. I guess probably may be six months or three months or longer.

Q. Three to six months later you decided that?

A. Yes, sir.

Q. What led you to the conclusion? Just trying think about the accident?

A. Trying to think about it and what took place and so forth.

* * * *

[pages 183-184]

Q. That's not what I'm asking you. You let him, didn't you sir?

A. I didn't -- I mean, he's the one that brought the truck. I couldn't drive it.

Q. I understand that. Did you tell Mr. Huston about this accident on June 21, 1989?

A. No, sir.

Q. Sir, did the seat belt properly restrain you on August 29, 1989?

A. Some. The belt.

Q. Did you know by March 12, 1992, the day before Mr. Huston looked at this truck, that the seat belt didn't properly restrain you, or to use your word, restrained you "some"?

A. The day before?

Q. Yes, March 12, 1992?

A. Did I know that it did?

Q. Yes.

A. Yes.

Q. And on March 12, 1992 -- the reason that I picked that date, sir, is that's the date of the deposition you

had with Mr. Eagen, the one that we were just talking about earlier?

A. Yes, sir.

Q. You remember that?

A. Yes, sir.

Q. And so the very next day you were down there again when the truck showed up down at Mr. Kennedy's office, correct?

A. I don't recall whether -- I could have been.

Q. Okay.

MR. BROCKMAN: Page 48 of that deposition, Mr. Kennedy.

Q. Look at line 20, sir. Let me get this out of your way, I'm sorry. Mr. Eagen -- I'm sorry, have you had a chance to read it?

A. Yes, sir.

Q. Mr. Eagen in that deposition where Carl Zugelter, Mr. Kennedy's partner at that time, was sitting with you asked you a question on line 20, page 48. "Did the seat belt properly restrain you," what was your answer then?

A. I said it did, some.

Q. You said, "as far as I know"?

A. As far as I know, and the shape I was in, in the seat of the truck when the accident happened.

Q. Do me a favor, if you could sir, because I have got you with the one copy there. Read what your entire

answer was in response to that question on line 20. Did the seat belt properly restrain you was the question, wasn't it?

A. As far as I know, it did. I mean, I was -- like I say, was between the door and the steering wheel. I mean, I had the seat belt on.

Q. Okay. When you went to the hospital, sir, the emergency...

* * * *

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

EXCERPTS OF TRIAL TESTIMONY OF
TED E. WEIMAN

Civil No. C-1-92-649
Trial of 5/2/94

Pages F-1 thru F-6

Excerpts of Trial Testimony of Ted E. Weiman

(taken 5/2/94)

* * * *

[pages 674-675]

. . .manufactured and you had been able to determine where it was manufactured?

A. Yes, sir, that was by Daal Industries in Collingwood, Ontario.

Q. Are you familiar with that factory, sir?

A. Yes, sir, very familiar.

Q. And how so?

A. It was one of the facilities I was responsible for.

Q. Sir, in this case, a gentleman by the name of Ron Huston has testified about examining the seat belt assembly and holding that assembly that we have as Defendant's Exhibit B in his hand and tipping it certain directions with a protractor on the mounting plate. Could you please show us where the mounting place is?

A. Okay, this is that flange that sticks out here on the side, and then the bolt is driven down that into the car body, itself, and then that retains the assembly in.

Q. He had also indicated that some of the car manufacturers have this pendulum in it set at a different degree than zero based on the mounting plate, if you use the mounting plate. Is that fact or fiction?

A. No, that's fact.

Q. Were you able to determine in this case, in particular, sir, as to where that pendulum is set in relation

to the mounting plate, what degree?

A. Yes, I did.

Q. How did you do that, sir?

A. Well, I did it first by using the protractor in reference to the pendulum, which is, you can see it here on the back side being perpendicular with the world, and then, second, I've got a drawing of the assembly to verify that number.

Q. Sir, I have got in my hand what we will mark as Defendant's Exhibit J, and I will put the exact number on it after I look at my exhibit list and see how high we have gone, could you tell us what this, tell us what that is, first.

A. Okay, this is an Allied Chemical drawing, what the industry calls the CG based or the plastic device that holds the pendulum in it.

Q. Okay. does that particular device --

MR. KENNEDY: May I approach the bench, Your Honor.

THE COURT: You may. Excuse us ladies and gentlemen.

(Side-bar conference).

MR. KENNEDY: Your Honor, this document I believe has never been furnished to me and it was not one

of the documents indicated as demonstrative evidence. I have got a couple of things that I haven't objected to, but I'm going to object to this.

MR. BROCKMAN: I disagree. It was at this

* * * *

[pages 680-682]

. . . new difference.

THE COURT: All right.

MR. BROCKMAN: And that way don't have to bother the jury with an another break and take it up later if we need to.

THE COURT: You're not asking about this document at this time. I have no problem with that.

MR. BROCKMAN: Just so we can keep moving.

THE COURT: I'm going to sustain the objection subject to a renewal of the introduction of this document at that time.

MR. BROCKMAN: Can I lay the foundation for it at least since he has got it in front of him?

THE COURT: No, if it's not admissible than that would be inadmissible.

(End of side-bar conference.)

THE COURT: All right, counselor.

BY MR. BROCKMAN:

Q. Mr. Weiman, did you make any effort independently to measure the center of gravity for this particular seat belt assembly at issue to determine where the pendulum was set in relationship to the angle of the mounting plate?

A. Yes, sir, that was my first thing that I did.

Q. Okay. And what is that measurement?

A. It's eight and a half degrees off perpendicular.

Q. What does that mean when you say it's eight and a half degrees off perpendicular. If you would just hold up the assembly and explain for the ladies and gentlemen of the jury?

A. This piece of blue plastic that you can see in the side of the frame is called a CG support, meaning center of gravity. And because of where the retractor is mounted in a car, you can't always make it perpendicular in both planes. Because of the seats of the floorboard or whatever the reason may be. And you have to set it on an angle. Well, the sensing mechanism has got to be perpendicular

with the world in both planes in order to function properly. So therefore, that particular piece of plastic is modeled with an angle into it so that when this sets in a car on a eight and a half degree angle, the pendulum will be perpendicular in both planes.

Q. What would then happen, sir, if one were trying to use a protractor attached to that mounting plate and move that seat belt assembly through a range of motion and measure the angle at which the seat belt assembly locks?

A. Well, if they used the mounting plate at zero in both planes and then they rotated it, they would be off in one plain or excuse me the two planes that are in the direction that the CG is the other two planes, it would be correct. Because they hadn't compensated for the eight and a half degrees.

Q. They would be off eight and a half degrees?

A. At least eight and a half degrees, right.

Q. Sir, this particular seat belt assembly, what is the part of it that actually locks the wheel, what is that called?

A. Well, the initial sensing, of course, is the CG weight that we just now talked about. This weight will sense the velocities change in may be twelve milliseconds. But when it moves, as I pointed out to you, this long black piece going across here is called a lock dog or a lock paw and engaging the gear teeth and prevents the webbing from coming back.

Q. This particular seat belt assembly at issue how many lock dogs are there?

A. There is only one.

Q. Could you explain to us then how with two retractors this particular seat belt assembly locks, is there only one lock dog?

A. This retractor is rather unique in that even though there is two retractors, one for the torso and one for the pelvic, there is only one lock dog in there. And the way it functions is when the webbing is pulled out of the pelvic and a lock up occurs, that raises the lock dog up into the gear teeth for the torso. Unless the pelvic is loaded, the torso. . .

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

EXCERPT OF NORFOLK SOUTHERN
RAILWAY COMPANY'S
BRIEF OF THE APPELLANT

Sixth Circuit Nº. 95-3489
Filed 8/7/95

Pages G-1 thru G-2

In Cook v. American S.S. Co., 53 F.3d (6th Cir. 1995), this Court held that appellate review of trial court rulings on the admissibility of expert testimony may, depending upon the assignment of error, involve as many as three separate standards of review. The preliminary fact finding under evidence Rule 104(a) is reviewed for clear error, whereas the determination of whether the expert opinion is properly the matter of "scientific, technical or otherwise specialized knowledge" is a question of law *de novo*. The trial court's determination as to whether a proper expert opinion will assist the trier of fact to understand the evidence or to determine a fact in issue is one reviewed for abuse of discretion. Cook, 52 F.3d at 738. Here, the review of the court's gate-keeping function is a question of law which this Court reviews *de novo*.

During trial, Huston was voir dired concerning his knowledge of medicine, factors causing injuries and the methodology he employed in testing the seat belt, in reaching his medical opinions and in reaching his conclusions. (Huston at TR. 237-264). Over defendant's objections, the court allowed Huston to testify that the seat belt at issue did not work and that Smelser's injuries were caused by the failure of the seat belt to restrain him.

This voir dire clearly established that Huston did not understand medicine, was not a medical doctor, and, more

importantly, had only reviewed four pages of Smelser's extensive medical records. (Huston at TR. 249-250, 325). He knew nothing concerning Smelser's prior medical history (Id. at TR 249); nor . . .

APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

EXCERPT OF CLAUDE SMELSER'S
BRIEF OF THE APPELLEE

Sixth Circuit Nº. 95-3489
Filed 10/20/95

Pages H-1 thru H-8

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. WHETHER A WITNESS WHO HOLDS A PH.D. IN ENGINEERING, WHO IS A FULL-TIME PROFESSOR AT A UNIVERSITY, WHO IS AN EXPERT IN BIOMECHANICS, WHO HAS TAUGHT COURSES AND WRITTEN EXTENSIVELY IN THE FIELD OF BIOMECHANICS, AND WHO HAS WORKED WITH PHYSICIANS, INCLUDING ORTHOPAEDIC SURGEONS, ON ISSUES RELATING TO THE FIELD OF BIOMECHANICS CAN RENDER AN OPINION ABOUT THE SPECIFIC CAUSE OF THE PLAINTIFF'S INJURIES WHEN HE ASSUMES THAT THE INJURIES HAVE OCCURRED AND THAT THE PLAINTIFF WAS FREE FROM SYMPTOMS PRIOR TO THE ACCIDENT.

2. WHETHER A WITNESS WHO HOLDS A PH.D. IN MECHANICAL ENGINEERING, WHO IS A FULL-TIME PROFESSOR AT A UNIVERSITY, AND WHO HAS WRITTEN EXTENSIVELY ABOUT RESTRAINT SYSTEMS CAN RENDER AN OPINION ON THE FAILURE OF A SEAT BELT, WHEN HE HAD TESTED THE ACTUAL SEAT BELT INVOLVED BOTH IN THE VEHICLE IN A ROAD TEST AND OUTSIDE THE VEHICLE NUMEROUS TIMES.

3. WHETHER THE COLLATERAL SOURCE RULE APPLIES TO THE DEFENDANT,S ATTEMPT TO ELICIT TESTIMONY CONCERNING MEDICAL INSURANCE WHERE THE PLAINTIFF HAS NOT SUGGESTED OR IMPLIED THE ABSENCE OF MEDICAL INSURANCE BUT HAS TESTIFIED CONCERNING MEDICAL INSURANCE AS A BASIS FOR HIS EXPERT WITNESS.

4. WHETHER EVIDENCE OF COLLATERAL ACTIONS AGAINST THIRD-PARTIES IS ADMISSIBLE INTO EVIDENCE WHEN THE NEGLIGENCE OF THE THIRD PARTIES IS NOT INCONSISTENT WITH THE POSITION TAKEN BY THE PLAINTIFF AT TRIAL.

5. WHETHER TESTIMONY FROM A TREATING PHYSICIAN THAT INJURIES WERE CAUSED IN AN AUTOMOBILE COLLISION IS RELEVANT IN A CASE INVOLVING THE FAILURE OF THE SEAT BELT IN THE SAME COLLISION.

6. WHETHER THE REDUCTION BY REMITTITUR OF A $3,500,000 VERDICT TO $1,668,000 IS APPROPRIATE WHEN THE DEFENDANT CAN POINT TO NO EVENT AT TRIAL WHICH COULD HAVE INFLATED THE JURY'S VERDICT AND WHEN THE PLAINTIFF'S INJURIES CAUSE HIM TO BE IN

CONSTANT PAIN AND WHEN THE PLAINTIFF HAS BEEN TOTALLY AND PERMANENTLY DISABLED BY HIS INJURIES.

7. WHETHER A CLAIM BY THE PLAINTIFF FOR LOST FUTURE WAGES AND BENEFITS IS PROPERLY SUBMITTED TO A JURY WHERE THE PLAINTIFF'S TREATING PHYSICIAN TESTIFIES THAT HIS INJURY IS PERMANENT, WHERE THE PLAINTIFF TESTIFIES THAT HE: CAN NO LONGER PERFORM HIS JOB DUTIES, AND WHERE A VOCATIONAL EXPERT TESTIFIES THAT THE PLAINTIFF IS UNEMPLOYABLE.

8. WHETHER THE PLAINTIFF IS REQUIRED TO APPORTION DAMAGES BETWEEN THE DEFENDANT AND ABSENT THIRD-PARTIES WHEN THE STATUTE GOVERNING THE ACTION STATES THAT THE DEFENDANT IS LIABLE IF ITS NEGLIGENCE PLAYED ANY PART IN CAUSING THE INJURIES TO THE PLAINTIFF.

9. WHETHER A JURY INSTRUCTION SHOULD BE SUBMITTED REQUIRING THE PLAINTIFF TO PROVE, THE PRECISE DEGREE OF AGGRAVATION OF HIS INJURY BY THE DEFENDANT'S NEGLIGENCE WHEN THE JURY HAS ALREADY BEEN SUBMITTED AN

INSTRUCTION THAT THE DEFENDANT IS NOT LIABLE FOR PRE-EXISTING CONDITIONS OR INJURIES AND IS ONLY LIABLE FOR THE AGGRAVATION OF THOSE INJURIES.

CROSS-APPEAL

10. WHETHER AN ORDER OF REMITTITUR IS APPROPRIATE IN REGARD TO A VERDICT OF $3,500,000 WHERE THE DEFENDANT CAN POINT TO NO EVENT AT TRIAL WHICH COULD HAVE CAUSED PASSION OR PREJUDICE ON THE PART OF THE JURY OR COULD HAVE INFLATED THE VERDICT AND WHERE THE INJURIES OF THE PLAINTIFF CAUSE HIM TO BE IN CONSTANT PAIN AND CAUSE HIM TO BE PERMANENTLY AND TOTALLY DISABLED.

Huston before qualifying him is an expert under Fed.R.Evid. 702 and under the principles enunciated in Daubert v. Merrell Dow Pharmaceuticals, Inc. (1993), 113 S.Ct. 2786, 125 L.Ed.2d 469. The extent of Dr. Huston's expertise can be appreciated, at least in part, by a comparison of his expertise with that of the experts put forward by the Defendant. His methodology in regard to both the opinion as to the failure of the seat belt and the opinion as to causation of injury was appropriate.

The trial court properly excluded testimony concerning collateral actions against third-parties because such actions were not relevant and such evidence would be confusing to the jury. In addition, the trial court properly applied the collateral source rule to exclude testimony concerning the Plaintiff's medical insurance, as the Plaintiff did not imply or suggest the absence of such insurance.

The trial court properly admitted the opinion of the Plaintiff's treating physician on causation of injury because such opinion is relevant in a case of negligence due to seat belt failure in the same collision.

The trial court properly refused to instruct the jury on apportionment of damages between the Defendant and absent third-parties, as such instruction is contrary to almost

all case law involving F.E.L.A. claims. In addition, the trial court properly instructed the jury on a "failure to warn" theory because the evidence supported the conclusion that the Defendant should have known of the defective seat belt.

Finally, the trial court abused its discretion in ordering a reduction of the judgment from the jury verdict because the Defendant is unable to point to any event at trial which could have caused passion or prejudice on the part of the jury in such a way that it would inflate its verdict and because the evidence of the Plaintiff's injuries and pain and suffering support the original verdict.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY ADMITTED THE TESTIMONY OF RONALD HUSTON, PH.D., THAT THE SEAT BELT FAILED AND THAT SUCH FAILURE CAUSED INJURY TO THE PLAINTIFF BECAUSE DR. HUSTON WAS QUALIFIED AS AN EXPERT UNDER RULE 702 OF THE FEDERAL RULES OF EVIDENCE BY HIS KNOWLEDGE, SKILL, EXPERIENCE, TRAINING, AND EDUCATION AND BY THE METHODOLOGY HE USED.

The Defendant, in its first two issues presented for review in its brief, states that the trial court erred in

permitting Dr. Huston to testify for the Plaintiff. Dr. Huston gave two opinions at trial. He testified that the seat belt involved failed on the day of the collision and that such failure caused or contributed to the injuries suffered by the Plaintiff. The Defendant questions, it seems, Dr. Huston's methodology in regard to both opinions and his credentials in regard to the opinion concerning causation of injury.

Any analysis of the propriety of expert opinion begins, necessarily, with a consideration of Fed.R.Evid. 702. Daubert v. Merrell Dow Pharmaceuticals, Inc. (1993), 113 S.Ct. 2786, 125 L.Ed.2d 469; Cook v. American S.S. Co. (1995), 53 F.3d 733 (6th Cir.). Fed.R.Evid. 702 states the following:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

As this Court stated in Cook v. American S.S. Co., supra, the trial court has several obligations under the rule. First, the trial court must determine whether or not the witness' "knowledge, skill, experience, training, or education" qualify him as an expert. This inquiry may include a

consideration of the tests conducted by the proposed expert. See Cook v. American S.S. Co., supra at 738. Second, the trial court must determine whether the opinion the proposed expert intends to give is properly the subject of "scientific, technical, or other specialized knowledge." In this inquiry the trial court may again look to the proposed experts methodology. Finally, the trial court must determine whether the proffered opinion "will assist the trier of fact to understand the evidence or to determine a fact in issue."

The Defendant first questions Dr. Huston's credentials in regard to his opinion as to causation of injury, or, in the language of the Rule, whether Dr. Huston has the "knowledge, skill, experience, training, or education" to give an opinion on causation of injury.

Dr. Huston testified at length in response to questions from the Plaintiff's counsel, the Defendant's counsel, and the trial court concerning his education, training, knowledge and experience. (Houston at TR. 221-265). Dr. Huston is a full-time professor in the Department of Mechanical, Industrial and Nuclear. . .